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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-780

CONTINENTAL ILLINOIS BANK AND TRUST COMPANY OF CHICAGO,
Petitioner,

v.

MOLLIE NUSSBACHER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PLAINTIFF-RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	5
1. Petitioner has shown no "special and important reasons" to warrant the exercise of the Court's discretion in favor of granting review on certiorari	5
A. The instant case seeks only a resolution of a unique factual situation, and a decision based upon the facts herein will have little precedential value	7
2. Petitioner has not shown error in the decision of the Court of Appeals, which is correct in all respects	9
A. The Court of Appeals properly held that Rule 23.1 does not require demand where it would be futile	9
B. The Court of Appeals properly found that demand would be futile and was, therefore, excused	11
3. No conflict exists between the decision of the Seventh Circuit and decisions of this Court on the same subject or the recent decision of the First Circuit in *Re Kauffman Mutual Fund Actions*	14
CONCLUSION	20
RESPONDENT'S APPENDIX A	RA-1

PAGE

Cases Cited

Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 (1935) 16-18

Cathedral Estates v. *Taft Realty Corp.*, 228 F.2d 85 (2d Cir. 1955) 7

City of Detroit v. *Dean*, 106 U.S. 537 (1882) 15

Cohen v. *Industrial Finance Corp.*, 44 F. Supp. 491 (S.D.N.Y. 1942) 8, 10

Corbus v. *Alaska Treadwell Gold Mining Co.*, 187 U.S. 455 (1903) 15

de Haas v. *Empire Petroleum Co.*, 435 F.2d 1223 (10th Cir. 1970) 7

Delaware & Hudson Co. v. *Albany & Susquehanna R.R. Co.*, 213 U.S. 435 (1909) 8, 10, 15, 16

Hammerstein v. *Superior Court of California*, 341 U.S. 491 (1951) 5

Hawes v. *City of Oakland*, 104 U.S. 450 (1881) 8, 15

Jannes v. *Microwave Communications, Inc.*, 57 F.R.D. 18 (N.D. Ill. 1972) 10

In re Kauffman Mutual Fund Actions, 479 F.2d 257 (1st Cir.) *cert. den.* 414 U.S. 857 (1973) 13, 14, 18, 19

Liboff v. *Wolfson*, 437 F.2d 121 (5th Cir. 1971) 7

Magnum Import Co. v. *Coty*, 262 U.S. 109 (1923) 5

Marco v. *Dulles*, 177 F. Supp. 533 (S.D.N.Y. 1959) 12

McAllister v. *United States*, 348 U.S. 19, 23 (1954) (Frankfurter, J.) (separate opinion) 6

In re Penn Central Securities Litigation, 367 F. Supp. 1158 (E.D. Pa. 1973) 19

PAGE

Pioche Mines Consol., Inc. v. *Dolman,* 333 F.2d 257 (9th Cir. 1964) *cert. den.* 380 U.S. 956 (1965) 7

Rice v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955) 5

Ross v. *Moffitt,* 417 U.S. 600 (1974) 5

Schwartz v. *Romnes,* 357 F. Supp. 30 (S.D.N.Y. 1973) 12

Schy v. *First National Bank of Boston and the Susquehanna Corp.,* Civil Action No. 72-1508C (D. Mass.) 13

Smith v. *Sperling,* 354 U.S. 91 (1957) 16

Surowitz v. *Hilton Hotels Corp.,* 383 U.S. 363 (1966) 18

Swanson v. *Traer,* 354 U.S. 114 (1957) 16

United Copper Securities Co. v. *Amalgamated Copper Co.,* 244 U.S. 261 (1917) 15

United States v. *ITT Continental Baking Co.,* 420 U.S. 194, 95 S. Ct. 926 (1975) 6

Wathen v. *Jackson Oil Co.,* 235 U.S. 635 (1915) 15

Rules Cited

Rules of the Supreme Court of the United States Rule 19(1) 5, 7

F.R. Civ.P. Rule 23.1 ..... 2, 3, 7, 9-12, 14-17

Equity Rule 94 ..... 10, 16

Other Authorities Cited

Address of Mr. Chief Justice Vinson Before the American Bar Assn., September 7, 1949, 89 S. Ct. v. 6

71 Civ. 1153 (KTD) 2

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BRIEF FOR PLAINTIFF-RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

Question Presented for Review

1. Did the Court of Appeals in a derivative action charging violation of the margin regulations erroneously reverse the finding of the District Court that demand would not be futile where the derivative corporation had formally determined that it would not initiate an identi-

cal action against petitioner and others in the Southern District of New York and the court in that suit denied a motion to dismiss for failure to comply with Rule 23.1; where the directors of the corporation participated in the unlawful transaction complained of and are defendants in the action; where the Chairman of the Board of the corporation swore that if demand were made, the board would reject it; and where the petitioner-defendant, not the corporation, sought dismissal of the action.

Statement of the Case

This stockholder suit arises from an alleged violation of Federal Reserve regulations resulting from an unlawful extension of credit to Leasco Corporation (Leasco) by a group of financial institutions, including the petitioner, Continental Illinois National Bank and Trust Co. of Chicago.*

In 1968, Leasco, a corporation engaged in computer leasing and other related services, made a tender offer for Reliance Insurance Company common stock in order to acquire Reliance. In connection with the tender offer, Leasco sought to buy the shares of certain holders of a key block of Reliance common stock, Class A. In order to meet the terms of its agreement with the Class A shareholders, Leasco was required to pay or arrange for the Class A shareholders to receive $57 million in cash. As a consequence, the challenged transaction was structured whereby the petitioner and others extended to

* There is presently pending in the United States District Court, Southern District of New York, a suit identical to the instant suit against other participants in the challenged transactions. 71 Civ. 1153 (KTD).

Leasco a loan of $57 million. The collateral, which consisted of Leasco's own securities, was insufficient to meet the requirements of the applicable provisions of the margin regulations. Leasco paid to the lenders interest at the rate of 15% *per annum,* well in excess of what it would have had to pay had the loan been properly collateralized. In addition, Leasco's collateral declined in value precipitously during the period in which the credit was outstanding. When redeemed, the collateral had a market value many millions of dollars less than its value at the time of the loan.

In 1971, a lawsuit substantially identical to the present action was commenced in the Southern District of New York by respondent against certain participants in the challenged transaction, including petitioner and members of Leasco's Board of Directors. The directors were charged with aiding and abetting the arrangers and lenders in the allegedly unlawful credit scheme and in solicitation of the lenders. As a result, plaintiff contended, the directors were liable to Leasco for the losses sustained by it, caused by the illegal loan. It was alleged that six out of seven of the individual defendants were members of the Leasco Board at the time suit was commenced and constituted a majority of that Board. Plaintiff, accordingly, alleged the futility of demand. After the institution of the New York action, Leasco's Board determined that it would not have initiated that suit. The Honorable Milton Pollack upheld the complaint on a motion to dismiss for failure to comply with Rule 23.1.*

In 1972, the instant action was commenced in the Northern District of Illinois, as the New York lawsuit had been dismissed as against petitioner for lack of venue. By

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* The decision of Judge Pollack was in substantial accord with that of the Seventh Circuit.

amended complaint, respondent alleged that the documented attitude of the Leasco Board with respect to the initiation of the New York action demonstrated the futility of demand in the identical Chicago litigation. Additionally, plaintiff alleged, demand was futile because of the Board's participation in the illegal transaction.

Futility of demand was further shown by the sworn statement of Saul P. Steinberg, Chairman of the Board of Leasco. Mr. Steinberg filed an affidavit on a motion to dismiss the original complaint herein which absolutely and clearly demonstrated the determination of the Leasco Board not to sanction initiation of the litigation by Leasco. Mr. Steinberg swore that had demand on Leasco been made, it would have been rejected. As the Court of Appeals correctly held, "the message is loud and clear that under no circumstances would the board of directors have approved the corporation bringing the action."

In light of the overwhelming and uncontroverted evidence of futility, the Court of Appeals reversed the District Court's clearly erroneous findings and decision. The Court made clear that no conflict among the Circuits is created by this case, since the decision turned upon a factual situation different from that in cases relied on by petitioner. Indeed, very rarely is a record so clear as to the futility of demand. The unique documentation of refusal by the Leasco Board to initiate this action presents a fact pattern that is unlikely to recur. Thus, it is improbable that the decision of the Court of Appeals, based upon unique facts, will have ramifications beyond the peculiar circumstances of this case.

REASONS FOR DENYING THE PETITION

1. Petitioner has shown no "special and important reasons" to warrant the exercise of the Court's discretion in favor of granting review on certiorari.

Rule 19(1) of this Court states, in part, that "[a] review on writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor." The issuance of a writ of certiorari is not compelled by the fact that jurisdiction exists,* since "jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."** Numerous factors other than the perceived correctness of the judgment the Court is asked to review determine whether it will exercise its discretion to grant a petition.***

The abstract intellectual challenge of a question raised does not create an issue "of substance", as this Court emphasized in *Rice* v. *Sioux City Memorial Park Cemetery.*† This Court does not sit to satisfy scholarly interest, "[n]or does it sit for the benefit of the particular litigants." The *Rice* court concluded that "special and important reasons imply a reach to a problem beyond the academic and the episodic," quoting with approval the view of Mr. Chief Justice Taft that this Court should be

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* See *Hammerstein* v. *Superior Court of California,* 341 U.S. 491 (1951).

** *Magnum Import Co.* v. *Coty,* 262 U.S. 159, 163 (1923).

*** *Ross* v. *Moffitt,* 417 U.S. 600 (1974).

† 349 U.S. 70, 74 (1955).

"consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties."* As Mr. Chief Justice Vinson observed in 1949, "[t]he Supreme Court is not, and never has been primarily concerned with the correction of errors in lower court decisions . . . To remain effective the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particulars facts and parties involved."**

In the instant case, the petitioner has presented no important legal issues. Rather, as discussed more fully below, it asks this Court to resolve a factual controversy of little, if any, general significance which it contends, the Court of Appeals erroneously determined.*** Since it has

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* *Ibid,* at 79. See also, *United States* v. *ITT Continental Baking Co.,* 420 U.S. 194, 95 S. Ct. 926, 929 n.1 (1975).

** Address of Mr. Chief Justice Vinson before the ABA, September 7, 1949, 69 S. Ct. v, vi.

*** The words of Justice Frankfurter in *McAllister* v. *United States,* 348 U.S. 19, 23, 24 (1954) (separate opinion) are appropriate here:

> "If this Court is to entertain a . . . case solely because we stand in review in the same position as the Court of Appeals with relation to the District Court and disagree with the result which the Court of Appeals reached in the application of the right standards, the opportunity that is afforded in this case for a review of the Court of Appeals is an opportunity that should generally be afforded when the Court of Appeals reverses a District Court."

shown no "special and important reasons" for granting the writ, it has failed to satisfy the requirements of Rule 19(1) and, accordingly, its petition should be denied.

A. The instant case seeks only resolution of a unique factual situation and a decision based upon the facts herein will have little precedential value.

The Court of Appeals reversed the ruling of the District Court which dismissed the complaint herein for failure to comply with Rule 23.1 F.R. Civ. P. The District Court had based its dismissal upon its conclusion that plaintiff, who had not made demand, had failed to demonstrate "that making a demand upon the board would be a futile or useless gesture." The Court of Appeals, stating that a "prospective derivative plaintiff does not have to launch an effort which would be fruitless or futile", found that demand would have been "meaningless" and deemed itself "satisfied that there was sufficient before the district court to preclude it in the exercise of proper discretion from dismissing the case on the 23.1 ground." Thus, the Court of Appeals did not take issue with any conclusion of law reached by the District Court, but rather, overruled the latter's conclusion that the facts of the case did not demonstrate futility of demand.

That the courts below had no serious legal disagreement is not surprising, since the law with respect to demand is, to a large degree, settled. It is now well established that where demand upon corporate directors would clearly meet rejection by them, the courts will dispense with the requirement that such demand be made.* The

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* *Cathedral Estates* v. *Taft Realty Corp.*, 228 F.2d 85 (2d Cir. 1955); *Pioche Mines Consol., Inc.* v. *Dolman*, 333 F.2d 257 (9th Cir. 1964), *cert. den.* 380 U.S. 956 (1965); *de Haas* v. *Empire Petroleum Company*, 435 F.2d 1223 (10th Cir. 1970); *Liboff* v. *Wolfson*, 437 F.2d 121 (5th Cir. 1971).

consistent standard recognized and applied by the courts in such cases is one of futility. This Court has long held that where demand would be a futile gesture, it will not be insisted upon.* Thus "[t]he rule or principle of law is clear": where demand would be futile, it will be excused.

In the instant case, therefore, since the applicable law has been determined by this Court, the issue to be resolved is a factual not a legal one, i.e., whether, under the circumstances of this case, demand would be futile. Further, this action involves a unique factual situation, unlikely to be duplicated. Thus, resolution of the controversy by this Court would affect only this litigation and would have little, if any, precedental value for other "demand" disputes since "each [Rule 23(b)] case should be considered upon its peculiar facts."** Indeed, no precise standard could be fashioned by this Court, since the rule "is intended to have practical operation and to have that it must, as to its requirements, be given such play as to fit the conditions of different cases."*** Accordingly, a determination herein by this Court would resolve little beyond the dispute between the parties, a function which this Court has consistently held it does not intend to serve.

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* As early as 1881, this Court recognized the futility of demand in some situations. *Hawes* v. *City of Oakland,* 104 U.S. 450, 461 (1881). See also, *Delaware & Hudson Co.* v. *Albany & Susquehanna R.R. Co.,* 213 U.S. 435 (1909).

** *Cohen* v. *Industrial Finance Corp.,* 44 F. Supp. 491, 494 (S.D. N.Y. 1942). Rule 23(b) is a predecessor to Rule 23.1.

*** *Delaware & Hudson Co.* v. *Albany & Susquehanna R.R. Co., supra,* at 452.

2. Petitioner has not shown error in the decision of the Court of Appeals, which is correct in all respects.

The Court of Appeals determined that plaintiff had complied with Rule 23.1 since she satisfied the "alternative prong" of that rule "which permits the plaintiff to explain why he made no demand." That court found that demand was not required since plaintiff had alleged facts sufficient to demonstrate that such demand would be futile. In both respects, plaintiff submits, the court was correct.

A. The Court of Appeals properly held that Rule 23.1 does not require demand where it would be futile.

Under Rule 23.1, the complainant in a derivative action need establish only one of two alternative prerequisites to suit: demand or futility of demand. The purpose of demand is to induce remedial action on the part of management and demand will be excused where it is apparent that if made, it would be refused. Rule 23.1 requires that in a derivative action, the plaintiff allege with particularity the efforts made to secure institution of the suit by the directors and the reasons for his failure to achieve such action *or* the reasons for not making the "effort." The rule does not unqualifiedly require demand of directors, but provides as an alternative that the plaintiff set forth the reasons for making no formal effort to secure corporate action. Thus, the rule, itself, makes clear that demand is not always a condition precedent to a derivative action and that exceptions to the demand requirement will be recognized.

Exceptions to the requirement of demand have a common base—futility. Thus, as early as 1909, this Court

held that Rule 94* was satisfied by allegations which indicated "that appeals to [the directors] for action would have been futile."** Many cases have followed that venerable opinion of this Court, and it is now well established that a complainant need not allege a demand on directors when it is clearly shown that if such a demand had been made it would have met with refusal, since the law does not require the performance of a vain and useless ceremony. Indeed, the cases interpreting Rule 23.1 and its predecessors are legion in holding that demand need not be made where it would be futile "[a]nd on a motion to dismiss the usual standard of whether any set of facts can be shown which would prove futility is applicable."***

However, as it did in the court below, the petitioner ignores the question of "futility", contending in effect that in a derivative action demand, even though futile, must always be made so that the board may determine conclusively "the position of the company with regard to the litigation proposal." Whether such a requirement would, as petitioner suggests, serve some useful purpose is not relevant to the issue herein, since the draftsman of Rule 23.1 did not impose an absolute requirement of demand. That rule is a flexible one "and any arbitrary construction of the rule, which would result in the emasculation of the equitable considerations that led to its enactment should be avoided."†

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* A predecessor to Rule 23.1.

** *Delaware & Hudson Co.* v. *Albany & Susquehanna R.R. Co., supra,* at 450.

*** *Jannes* v. *Microwave Communications, Inc.,* 57 F.R.D. 18, 21 (N.D. Ill. 1972).

† *Cohen* v. *Industrial Finance Corp., supra,* at 494.

B. The Court of Appeals properly found that demand would be futile and was, therefore, excused.

Plaintiff's allegation in her amended complaint that she made no demand because to do so would have been futile was properly deemed a valid one by the Court of Appeals. Plaintiff stated that the board of directors of Leasco had formally determined that it would not have initiated an action begun by plaintiff in New York, identical in virtually all respects to the suit filed in Illinois.* "In view of the expressed attitude of Leasco's directors in an identical action commenced by plaintiff in which the defendant Continental was a defendant for a portion of the time"**, plaintiff alleged, the directors would not adopt a different attitude toward the commencement of the action against Continental in Illinois. The opposition of Leasco's Board to the commencement by Leasco of an identical action clearly established its position with respect to this litigation which differed only as to venue.*** Leasco's attitude was set forth on a motion to dismiss for failure to comply with Rule 23.1 which was made and denied in the New York action. Thus, the position which Leasco's Board would take with respect to commencement of the present action was fully known to plaintiff before she instituted this suit. Clearly, demand would have been a wasted gesture.

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* The minutes of the meeting of the board of directors referred to in the complaint were quoted by the Court of Appeals in its opinion.

** Complaint.

*** The action was dismissed in New York against the petitioner on the ground of improper venue and was thereafter instituted in Chicago. In the New York action as in the present suit, Leasco did not make or join in the motion to dismiss.

Plaintiff further alleged that Leasco directors who constitute a majority of the present board participated in and aided and abetted the defendant arrangers and lenders in the illegal credit plan complained of and, accordingly, are personally liable for damages sustained by Leasco. They cannot, plaintiff stated, be reasonably expected to enforce Leasco's rights.

Plaintiff's allegations with respect to the expressed attitude of Leasco's Board were fully supported by the underlying facts and were uncontroverted. In an affidavit submitted on the motion to dismiss, Saul Steinberg, Leasco's Chairman, stated that the Board's position with reference to the New York action was the same in respect to the "present derivative suit."

Allegations of demand or futility of demand in the same or related cases have been held a sufficient justification for failure to make demand. In *Marco* v. *Dulles,** the court held that where futility of demand on the board of directors was properly alleged in one action it was properly alleged in another action for the "same cause." In *Schwartz* v. *Romnes,*** allegations of the failure of the derivative corporation to act in a related case was held sufficient compliance with Rule 23.1.

Additionally, plaintiff's allegation that Leasco's directors participated in an illegal transaction and abetted unlawful conduct in connection therewith is, as the Court of Appeals found, sufficient to excuse demand."*** Although

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* 177 F. Supp. 533 (S.D.N.Y. 1959).

** 357 F. Supp. 30 (S.D.N.Y. 1973).

*** The District Court in New York reached essentially the same conclusion.

the ultimate liability of the directors will only be determined by a decision on the merits, their exposure to such liability is real and not, as defendant contends, plaintiff's invention.* Thus, the Court of Appeals deemed appropriate to the instant case the words of Judge Coffin in *Kauffman,*** in which he found it difficult to imagine that a director who had participated in an alleged violation of federal law would authorize a suit against himself.

Plaintiff submits that as shown above, the allegations of her complaint demonstrate that demand would be futile. However, if any doubt remained with respect to futility, Leasco's Chairman eliminated it. In an affidavit submitted upon the motion to dismiss, Mr. Steinberg swore that the previous position taken by Leasco's Board in New York was the same with respect to the "present derivative suit" and that if demand had been made by plaintiff upon Leasco to initiate the present action, it "would have been rejected." Mr. Steinberg assured the court that he had discussed the possible commencement of this action by Leasco with its other directors and that they were in agreement with the views expressed by him.

Thus, Mr. Steinberg, Leasco's Chairman, flatly stated with the Board's approval, that if asked, Leasco would

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* Cases other than the present one have been initiated against directors of a borrowing corporation involved in an alleged illegal extension of credit entered into prior to the enactment of Regulation X. See, *e.g., Schy* v. *First National Bank of Boston and the Susquehanna Corp.,* Civil Action No. 72-1508C (D. Mass.)

** *In re Kauffman Mutual Fund Actions,* 479 F.2d 257, 267-269 (1st Cir.) (concurring opinion) *cert. den.* 414 U.S. 857 (1973).

not commence the present action.* It is difficult to believe that the Board or Mr. Steinberg could have expressed themselves more clearly. Likewise, it is difficult to imagine a more clear cut, documented case of futility. In the face of Mr. Steinberg's sworn assertion that demand would be unavailing, the holding of the district court that demand would not be futile appears absurd. Accordingly, the Court of Appeals properly found that the district court abused its discretion in dismissing the complaint.

3. No conflict exists between the decision of the Seventh Circuit and decisions of this Court on the same subject or the recent decision of the First Circuit in *Re Kauffman Mutual Fund Actions.*

The interpretation of Rule 23.1 adopted by the Seventh Circuit is in full accord with the decisions of this Court on the same subject and does not conflict with the decision of the First Circuit in *Re Kauffman Mutual Fund Actions.***

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* Petitioner never comes to grips with Mr. Steinberg's sworn declaration of futility and seeks instead to convince the Court that Rule 23.1 imposes a requirement that plaintiff make demand upon the corporate board, a conclusion which the Seventh Circuit correctly found would render meaningless "the alternative prong of Rule 23.1 which permits the plaintiff to explain why he made no demand." Additionally, although the petitioner scolds the plaintiff for attempting to wrest control from the directors, it is the petitioner which benefitted from illegal transactions complained of, not Leasco, which seeks to dismiss the action under Rule 23.1. Indeed, Leasco, represented by a distinguished law firm, has expressed its neutrality with respect to the prosecution of this litigation and did not join in the motion to dismiss. Nevertheless, the alleged wrongdoer attempts to impose upon Leasco a dismissal which it did not seek.

** 479 F.2d 257, 269 (1st Cir.), *cert. den.* 414 U.S. 857 (1973).

This Court has unequivocably held that demand is excused where appeals to directors for action would be futile. Since the Seventh Circuit found that demand in the instant case would be "meaningless", its conclusion that demand was excused is fully consonant with the decisions of this Court.

None of the cases cited by petitioner stand for the proposition that demand is always required. Petitioner relies heavily upon *Hawes* v. *Oakland,* asserting that in that case the Court stated that "no derivative action would be entertained if the stockholder had not made a *demand* upon the directors". However, as petitioner neglected to point out, the Court in *Hawes* found that demand would be excused where the plaintiff has shown that "it was not reasonable to require it."*

Nor has this Court ruled, as petitioner suggests, that compliance with Rule 23.1 entails more than a showing of demand or futility of demand. Indeed, this Court has ruled to the contrary. In *Delaware & Hudson Co.* v. *Al-*

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* The other "demand" cases cited by petitioner are likewise not in conflict or inapplicable to the facts of this case. Thus, in *Corbus* v. *Alaska Treadwell Gold Mining Co.,* 187 U.S. 455 (1903), the plaintiff made no demand and relied "simply on the distance of the directors from the place where he resides and in which the court is held." This Court found the excuse to be "not sufficient;" in *City of Detroit* v. *Dean,* 106 U.S. 537 (1882), a diversity case, the Court found that the derivative corporation's refusal to sue was a "pretense" designed "to create for one of the directors a fictitious ground for federal jurisdiction." (at 541); in *United Copper Securities Co.* v. *Amalgamated Copper Co.,* 244 U.S. 261 (1917), there was no allegation that the derivative corporation was in the control of the alleged wrongdoers or that the directors had "been guilty of any misconduct whatsoever". (at 264); and in *Wathen* v. *Jackson Oil Co.,* 235 U.S. 635 (1915), the plaintiff had made no demand and the Court found that it did not appear that "such a request would be futile." (at 640).

bany & Susquehanna Railroad Co., the Court held that Rule 94 was satisfied by allegations which demonstrated that demand would be futile. The court stated that "the good faith of the directors need not be questioned." Further, "[t]he attitude of the directors need not be sinister. It may be sincere."*

In *Smith* v. *Sperling,*** the district court had found that if demand had been made to institute suit, "the management would not have been disqualified 'from faithfully doing their duty' but that 'such a demand would have been futile' . . . The Court of Appeals affirmed." This Court stated:

> "The bill therefore meets the requirements of Rule 23(b) of the Rules of Civil Procedure, 28 U.S. C.A. that the stockholder show with particularity what efforts he made to get those who control the corporation to take action, 'and the reasons for his failure to obtain such action or the reasons for not making such effort.' And see Hawes v. City of Oakland, 104 U.S. 450, 26 L. Ed. 827; Delaware & Hudson Co. v. Albany & S.R. Co., 213 U.S. 435, 29 S. Ct. 540, 53 L. Ed. 862."

In *Ashwander* v. *Tennessee Valley Authority,* this Court held that plaintiffs, "upon showing their demand and its refusal [had] complied with the applicable rule."***

In *Swanson* v. *Traer,*† cited by petitioner, this Court did not rule upon compliance with the requirement of Rule 23.1, but held that in a diversity suit, the question

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* 213 U.S. 435, 451.

** 354 U.S. 91, 94 n. 2 (1957).

*** 297 U.S. 288, 318 (1935).

† 354 U.S. 114 (1957).

of whether a stockholder may sue on behalf of his corporation is governed by local law. Accordingly, since this case is not based upon diversity, but rather upon a violation of federal law, state-law concepts as to the nature of derivative suits are inapplicable.

Thus, it is clear that the determination of the Seventh Circuit that demand was futile and should be excused in no way contravenes decisions of this Court. Petitioner, however, attempts to create a conflict where none in fact exists. Although petitioner moved to dismiss the complaint on the ground that plaintiff had failed to comply with Rule 23.1 and the district court dismissed the action for failure "to meet the demand requirements of Fed. R. Civ. P. 23.1", on appeal the petitioner sought to expand the issue to one of business judgment and "whether this is a case of the special character which stockholders may bring." The Court of Appeals properly held that the "demand" issue tendered by the petitioner and determined by the District Court did not encompass the aforesaid "merits questions" which were not resolved at the District Court level and had "no proper place" in the appeal before it.

The Court of Appeals found, in effect, that the complaint showed on its face "that the action falls within the ambit of an equitable basis for stockholder basis" since it "charges director complicity being directly involved in illegal transactions which were alleged to be to the detriment of the corporation." This conclusion is in complete accord with rulings of this Court. In *Ashwander* v. *Tennessee Valley Authority*,* where plaintiffs challenged a contract "both as injurious to the interests of the corporation and as an illegal transaction violating fundamental law" this court held that plaintiffs had the right to seek

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* *Supra*, at 318-319.

equitable relief. The Court stated that "[i]n such a case it is not necessary for stockholders—when their corporation refuses to take suitable measures for its protection—to show that the managing board or trustees have acted with fraudulent intent or under legal duress . . . Nor is it necessary to show that the transaction was *ultra vires* the corporation." It was sufficient, this Court stated, that the illegality alleged results from actions "on the part of those with whom the corporation is attempting to deal."

In the instant case, as the Court of Appeals noted, the plaintiff alleges that the corporation was severely injured by an illegal loan transaction in which the directors participated and that in connection therewith they aided and abetted the defendants' unlawful conduct.* Accordingly, "plaintiff (has) made a sufficient showing to entitle (her) to bring suit."**

As the decision of the Seventh Circuit does not conflict with decisions of this Court, similarly, it does not conflict with the decision of the First Circuit in *Kauffman*. As the Seventh Circuit stated in its decision, *Kauffman* "involved a significantly different factual situation inasmuch as it was not alleged that the majority unaffiliated directors also participated in or even approved of the acts of

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* The petitioner seeks to introduce into this action a controversy with respect to the value of derivative actions as a genre. This Court has discussed such suits in *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 370 (1966) and has made clear that "derivative suits have played a rather important role in protecting shareholders." Notwithstanding the possibility that, like any other device, a derivative suit is subject to abuse, that the instant case is not without basis is demonstrated by the fact that in the New York action, where extensive discovery was engaged in, the defendants' motions for summary judgment were denied.

** *Ashwander, supra,* at 323.

which complaint was made." "In Kauffman, the underlying facts not only did not support but directly contradicted the plaintiffs' allegations that the board of directors of the mutual funds on whose behalf the plaintiffs sought to sue was under the domination and control of certain investment advisers named as defendants."* Accordingly, the First Circuit felt that under the facts of that case, plaintiff had failed to show that demand would be futile. Here, as the Seventh Circuit found, "demand was clearly futile since it was apparent that the board members were inflexible in their position that corporate action against the defendants would not be taken." In denying petitioners' motion for a stay of mandate pending application to this Court for a writ of certiorari, the Court of Appeals stated that "the factual situation in *Kauffman* is quite different from that in the present case, and no conflict among the circuits is presented by the present case." (Respondent's Appendix A). Thus, the decision in *Kauffman* is basically in harmony with that of the Seventh Circuit, and the differing result arrived at by the two courts merely emphasizes that the question of demand is basically a factual one and that each decision rests upon its own peculiar factual basis.

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* *In re Penn Central Securities Litigation*, 367 F. Supp. 1158, 1164 (E.D. Pa. 1973).

CONCLUSION

The petition shows, under criteria governing review on certiorari, no special or important reasons for granting the writ. Additionally, the decision of the Court of Appeals was correct in all respects. Accordingly, the petition for a writ of certiorari should be denied.

Dated: New York, New York
January 9, 1976

Respectfully submitted,

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RESPONDENT'S APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 30, 1975

Before

Hon. WILBUR F. PELL JR., Circuit Judge

MOLLIE NUSSBACHER,

Plaintiff-Appellant,

No. 74-1142

vs.

CONTINENTAL ILLINOIS NATIONAL BANK, etc., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(73 512 C)

This matter comes before the Court on the "MOTION FOR STAY OF MANDATE PENDING APPLICATION BY APPELLEE TO THE UNITED STATES SUPREME COURT FOR WRIT OF CERTIORARI," filed herein on September 29, 1975 by counsel for the defendant-appellee Continental Bank. Said appellee,

in support of its motion for stay, basically asserts the claim that the opinion of this Court of July 15, 1975 creates a conflict between circuits, and in support thereof relies upon *In Re Kauffman Mutual Fund Actions,* 479 F.2d 257 (1st Cir. 1973).

As pointed out in the opinion of this Court, the factual situation in *Kauffman* is quite different from that in the present case, and no conflict among the circuits is created by the present case.

It does not appear that the grounds asserted in the motion are of sufficient consequence to override Circuit Rule 21. Upon consideration of the foregoing,

It is Ordered that the motion of the defendant-appellee Continental Bank for stay of mandate be, and the same is hereby, Denied.